Supreme Court, U. S.
FILED
MAY 12 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1454

JACK O. PEARSON,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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The appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Court of Criminal Appeals of the State of Oklahoma on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.
CHALLENGE TO JURISDICTIONAL STATEMENT

The appellant maintains that this Court has jurisdiction for the reason that the decision of the Court of Criminal Appeals construes 21 O.S. 1971, §§ 421 and 1757, in a man-

ner which violates the Fourteenth Amendment of the United States Constitution. However, it is submitted that, upon a review of the jurisdictional statement submitted by the appellant, this Court will find that the issues involved do not directly relate to the constitutionality of the heretofore mentioned state statutes. It is submitted that the issues presented are (1) the sufficiency of the evidence to sustain the conviction and (2) admissibility of evidence secured through electronic recording. It is thus submitted that the issues do not present a case reviewable under 28 U.S.C., § 1258.

II.
NATURE OF THE CASE

A. ISSUES PRESENTED

Appellant sets forth six questions to be considered in the Jurisdictional Statement. However, appellee respectfully submits that there are, in fact, only two issues, to-wit:

(1) Is the Fourth Amendment prohibition against unreasonable searches and seizures violated by the introduction into evidence of tapes of telephone conversations made with the consent of one of the participants?

(2) Was the evidence introduced at trial sufficient to establish that the appellant was guilty of the crime of Conspiracy to Commit Murder?

B. THE PROCEEDINGS BELOW

The appellant, Jack O. Pearson, was charged, tried and convicted in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-74-2921, for the crime of Con-

spiracy to Commit Murder in the First Degree. Appellant was sentenced in accordance with the unanimous verdict of the jury to serve a term of two (2) years imprisonment; a fine of Five Hundred Dollars ($500.00) was suspended by the court. From said Judgment and Sentence, the appellant appealed to the Oklahoma Court of Criminal Appeals, Case No. F-75-430. On February 5, 1976, that court entered a decision affirming the Judgment and Sentence [Appendix B of the Appellant's Jurisdictional Statement]. However, upon defendant's application for rehearing, the court withdrew the mandate previously issued and reconsidered the briefs subsequently submitted. On November 23, 1976, the Oklahoma Court of Criminal Appeals issued a second opinion wherein the Judgment and Sentence was again affirmed [Appendix A of the Jurisdictional Statement]. The second opinion of the court is reported at 556 P.2d 1025 (Okl. Cr. 1976).

III.
STATEMENT OF CASE

By Information filed in Case No. CRF-74-2921, George Kriz, Linda Pearson, and Jack O. Pearson were charged as co-conspirators for the crime of Conspiracy to Commit Murder in the First Degree, in violation of 21 O.S. 1971, § 421. George Kriz was granted immunity in exchange for his testimony; pursuant to the State's request for dismissal, the action against Mr. Kriz was dismissed. The statement of testimony contained in paragraph one of the Judisdictional Statement is hereby adopted as an accurate statement regarding the testimony introduced at trial. However, appellee challenges the statement of facts contained in para-

graph two [page 7 of the Jurisdictional Statement] wherein the appellant states that Linda Pearson was dismissed by the District Court for insufficient evidence. It is submitted that upon a review of the record this Court will find that Linda Pearson was dismissed by the District Court subsequent to the preliminary hearing and prior to trial. However, there is no order contained in the record which would reflect the reason for dismissal. The Oklahoma Court of Criminal Appeals found, from the testimony adduced at trial, that Linda Pearson was a co-conspirator and that the evidence was sufficient to establish that the appellant was guilty of the crime of Conspiracy to Commit Murder.

IV.
ARGUMENT

A. ADMISSION OF THE RECORDINGS MADE BY AN ELECTRONIC DEVICE WAS PROPER.

In the first proposition of error, appellant maintains that the introduction of a tape recording of a telephone conversation was in violation of the Fourth Amendment prohibition against unlawful search and seizure. Appellant attempts to distinguish this Court's decisions in *United States* v. *White*, 401 U.S. 745, and *Rathbun* v. *United States*, 355 U.S. 107 (1957), from the case at bar. In the opinion now being appealed, the Oklahoma Court of Criminal Appeals relied upon prior decisions by this Court in determining that one who voluntarily enters into a conversation with another takes the risk that such person may memorize, record, or even transmit the conversation. See *Rathbun*, supra; *Lopez* v. *United States*, 373 U.S. 427 (1963); *Hoffa* v. *United States*, 385 U.S. 293 (1966). The court concluded

that the recording in question was between Don Woodyard and the appellant. Don Woodyard gave his consent to record the conversation between himself and the appellant and, thus, the conversation was divested of its private character. The court concluded that the recording did not constitute an "unlawful intercept" as prohibited by the State law [21 O.S. 1971, § 1757], and the related federal act [Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., §§ 2510 through 2520].

Appellee respectfully submits that as stated by the United States Court of Appeals for the Sixth Circuit in *United States* v. *Hodge*, 539 F.2d 898 (6th Cir. 1976):

> "No one has a constitutionally protected expectation that the person to whom he voluntarily reveals incriminating information will keep it a secret, the consensual interceptions permitted under this provision [18 U.S.C., § 2551(2)(c)] do not offend the Fourth Amendment."

See also, *United States* v. *Quintana*, 508 F.2d 867 (7th Cir. 1975).

B. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE APPELLANT CONSPIRED TO COMMIT A FELONY.

In the second proposition of error appellant maintains that the conviction is violative of the Fourteenth Amendment of the United States Constitution in that the State failed to establish that there was an agreement by two or more persons to constitute the crime of Conspiracy. The appellant argues that due to the dismissal of the two alleged co-conspirators the judgment against the remaining conspirator must be vacated.

The Oklahoma Court of Criminal Appeals stated that the testimony at trial clearly established that Linda Pearson was a co-conspirator within the legal meaning and definition of that term. Appellant maintains that the dismissal of Linda Pearson subsequent to the preliminary hearing was proof that there was "insufficient evidence" to sustain the charges. It is submitted that the record is silent regarding the reason for dismissal. However, it is clear that the dismissal was made prior to the trial and thus not on the merits of the testimony presented at the trial. It is submitted that neither the guilt nor the innocence of the alleged co-conspirator, Linda Pearson, was settled by the dismissal prior to trial.

It is not necessary, in order to sustain a conviction for conspiracy, that co-conspirators be charged or convicted. See *Ng Pui Yu* v. *United States*, 352 F.2d 626 (9th Cir. 1965). It is submitted that upon a review of the testimony this Court will conclude that the evidence was sufficient to sustain a conspiracy conviction.

CONCLUSION

Appellee submits that the tape recording of the telephone conversation was admissible and not in violation of the Fourth Amendment of the United States Constitution. Appellee further submits that the evidence adduced at trial was sufficient to establish that the defendant was a co-conspirator in the crime of Conspiracy to Commit a Murder.

WHEREFORE, appellee respectfully submits that the questions presented by the appellant are so unsubstantial as not to need further argument. Appellee respectfully

moves this Court to dismiss the appeal or in the alternative to affirm the judgment entered in this cause by the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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May, 1977

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the instrument to which this certification is attached were mailed to the following named counsel this ..... day of May, 1977:

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